Wong Nget Thau & Anor v Tay Choo Foo

HIGH COURT (TAWAU) — SUIT NO T(22)-6 OF 1994
IAN CHIN J
24 AUGUST 1994

Civil Procedure *— Summary judgment — Defence — Whether court can examine affidavits and documents in detail to determine if defendant has bona fide defence — Rules of the High Court 1980 O 14*

Civil Procedure *— Summary judgment — Triable issues — Claim for balance purchase price for shares*

Evidence *— 'Without prejudice' communications — Letter from defendant's solicitor to plaintiffs — Whether automatically privileged and inadmissible*

The plaintiffs alleged that they had entered into an agreement with the defendant for the sale of the plaintiffs' shares in a company, Harus Abadi Sdn Bhd, to the defendant or his nominees for RM256,640. The defendant, however, contended that the purchase price for the shares was RM76,992 which he had already paid to the plaintiffs. The plaintiffs brought an action against the defendant for the sum of RM179,648, being the balance of the purchase price, and applied for summary judgment under O 14 of the Rules of the High Court 1980. The plaintiffs relied on, inter alia, a letter from the defendant's solicitor which was marked 'without prejudice'.

Held, allowing the plaintiffs' application:

(1) The court was obliged to go through the affidavits and documents in detail to see if there was a fair or reasonable probability of the defendant having a real or bona fide defence. Though it was trite law that a conflict of evidence ought not to be disposed of on affidavit evidence only, it was also trite law that the affidavit evidence must not be uncritically accepted.

(2) From the correspondence between the parties and the documents, it was clear that the purchase price was RM256,640. There was no triable issue and it was a clear case for summary judgment as the defendant had not been able to show the court why there should be a trial.

(3) The fact that a document is headed 'without prejudice' does not conclusively or automatically render it privileged from admission in evidence in any subsequent proceedings. The court must, in deciding whether a letter marked 'without prejudice' is admissible, consider whether the letter was part of a genuine attempt to settle a dispute. As no dispute existed at the time of the letter, it could not be said to have been written in an attempt to settle a dispute or in the course of negotiation, and was therefore admissible.

[**Bahasa Malaysia summary**

Plaintif mengatakan bahawa mereka telah mengikat suatu perjanjian dengan defendan untuk menjual saham plaintif di dalam suatu syarikat, Harus Abadi Sdn Bhd, kepada defendan atau penerima namaannya bagi jumlah RM256,640. Defendan, bagaimanapun, menegaskan bahawa harga belian saham itu adalah RM76,992 yang beliau telahpun membayar kepada plaintif. Plaintif telah membawa suatu tindakan terhadap defendan untuk jumlah RM179,648, yang merupakan baki harga belian, dan telah memohon untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Plaintif telah bergantung pada, antara lain, sepucuk surat daripada peguamcara defendan yang telah ditandakan 'tanpa menjejas'.

Diputuskan, membenarkan permohonan plaintif:

(1) Mahkamah berkewajipan untuk meneliti afidavit dan dokumen untuk menentukan sama ada terdapat kemungkinan yang baik atau munasabah bahawa defendan mempunyai suatu pembelaan yang benar atau bona fide. Walaupun ianya adalah undang-undang mantap bahawa suatu percanggahan keterangan tidak seharusnya diputuskan berdasarkan keterangan afidavit sahaja, ianya juga merupakan undang-undang mantap bahawa keterangan afidavit tidak boleh diterima secara tidak dikritis.

(2) Daripada persuratan di antara pihak-pihak dan dokumen, adalah jelas bahawa harga belian ialah RM256,640. Tidak ada isu yang perlu dibicara dan adalah jelas bahawa ia merupakan suatu kes yang sesuai untuk diberikan penghakiman terus kerana defendan tidak dapat menunjukkan kepada mahkamah sebab mengapa suatu perbicaraan seharusnya diadakan.

(3) Hakikat bahawa sesuatu dokumen itu bertajuk 'tanpa menjejas' tidak pada kesimpulannya atau secara automatik menjadikannya terlindung daripada dikemukakan sebagai bukti di dalam sebarang prosiding kemudiannya. Mahkamah mesti, apabila memutuskan sama ada sepucuk surat yang ditandakan 'tanpa menjejas' itu boleh terima, mempertimbangkan sama ada surat itu merupakan sebahagian daripada suatu percubaan yang benar untuk menyelesaikan suatu pertikaian. Oleh kerana tidak ada pertikaian yang wujud pada masa surat itu ditulis, ia tidak boleh dikatakan ditulis sebagai suatu percubaan untuk menyelesaikan suatu pertikaian ataupun dalam proses perundingan, dan dengan yang demikian adalah boleh terima.]

Notes

For cases on summary judgments, see 2 *Mallal's Digest* (4th Ed) paras 2178–2296; [1989] Mallal's Digest 504–562; [1990] Mallal's Digest 400–436; [1991] Mallal's Digest 447–496; [1992] Mallal's Digest 363–392; [1993] Mallal's Digest 288–310.

For cases on 'without prejudice' communications, see 7 *Mallal's Digest* (4th Ed) paras 1426–1427; [1989] Mallal's Digest 828–829; [1991] Mallal's Digest 1157–1159.

Cases referred to

Banque de Paris et Des Pays-Bas (Suisse) SA v Costa de Naray & Anor [1984] 1 Lloyd's Rep 21 (folld)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (folld)
Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312 (folld)
Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17 (refd)
Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors [1994] 1 MLJ 495 (folld)
Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (folld)
Ribu Daya Sdn Bhd v Malsa Ideal Sdn Bhd & Ors (Tawau High Court Civil Suit No T25–1991, 2 July 1994) (unreported) (folld)
South Shropshire District Council v Amos [1987] 1 All ER 340; [1986] 1 WLR 1271 (folld)
Styrobilt Sdn Bhd v Kumpulan Kim Huat (Sin Kee) Sdn Bhd [1990] 2 CLJ 848 (refd)
Suppuletchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368 (folld)
Tractors (M) Bhd v Tio Chee Hing [1975] 2 MLJ 1 (folld)

David Fung (*Alex Pang & Co*) for the plaintiffs.
Sonny Durai (*Wong Yapp Chung & Co*) for the defendant.

Cur Adv Vult

Ian Chin J: This is an application for summary judgment taken out on 19 July 1994 by Wong Nget Thau and Wong Nget Tsin @ Zaiton ('the plaintiffs') against Tay Choo Foo ('the defendant') for the sum of RM179,648, being the balance of the purchase price of the plaintiffs' shares in a company called Harus Abadi Sdn Bhd ('the company'). The court heard arguments on 16 August 1994 and adjourned to today for judgment. The plaintiffs' claim arose in this manner.

On 28 September 1988, the Director of Lands and Surveys, Sabah, offered to alienate about 800 acres of land to the company, which was accepted by the company. At about this time, another company called Golden Spring Development Sdn Bhd, of which the defendant was at all relevant time a director and shareholder, was also the successful applicant of a parcel of land that was appurtenant to the land approved to the company. On an unknown date and time, one Stella Chin, the plaintiffs' sister ('the sister'), who had been acting with the authority of the plaintiffs about the land application, was approached by the defendant for the purchase of the land approved to the company. The plaintiffs alleged that it was through an undated agreement ('the agreement') and various exchanges of correspondence that the plaintiffs and the defendant had arrived at an agreement for the sale and purchase of the land of the company through the transfer of the plaintiffs' share in the company to the defendant or his nominees. The alleged agreed terms of the agreement are as follows:

(1) the total purchase price for the plaintiffs' two shares was to be the sum of RM256,640 which was worked out at RM320 per acre of the land;

(2) a sum of RM76,992 was to be paid upon the signing of the said undated agreement; and

(3) the balance of RM179,648 was to be paid upon the issue of the title of the land to the company and upon the execution and submission to the advocate for the defendant the various documents to effect the change in the share ownership and directorship of the company.

A sum of RM76,992 (less bank charges) was remitted by the defendant to the plaintiffs on 7 June 1990. Certain of the ensuing events had been briefly described in the plaintiffs' affidavit, the relevant averments of which are:

(13) In or about June 1990 at the request of the [defendant], the [plaintiffs] each signed forms of transfer of shares of their one (1) share each in [the company] to unnamed transferees and also each signed an undated letter stating that each of them resigned from their respective positions as directors in [the company], and sent the same to the [defendant] in Kuching. Copies of the signed transfer of share forms and letter of resignation as director are now produced and shown to us marked 'WNT8a–c'.

(14) On 18 July 1991 or thereabouts, the two shares formerly held by us were transferred into the respective names of Tan Mooi @ Tan So Yin (f) (the [defendant's] wife) and either one Milli Anale Buajan or Keraline Bedu (f). ...

(15) On 22 March 1993, the title to the said land was issued and registered by the Lands and Surveys Department in the name of [the company].

(16) We therefore have fully performed our obligation under the said agreement.

(17) However, in breach of the condition of the said agreement, the [defendant] has failed to pay the balance of the purchase price of RM179,648 ...

The agreement and the correspondence which I referred to earlier, will now be adverted to in some detail for the purpose of considering the contentions of both parties. The existence of these documents is not disputed. A photocopy of the agreement shows that it was prepared by JB Singh, an advocate practising in Kuching ('the said advocate'), and though it was made between the plaintiffs of the one part and the defendant of the other part, only the plaintiffs had executed the same. This agreement was handed by the defendant to the plaintiffs for execution and thereafter returned to the defendant. The agreement is in the following terms, viz:

> This agreement is made this ___ day of ___ 1990 between: (1) Wong Nget Thau (BIC H0 143457); and (2) Wong Nget Tsin @ Zaiton (BIC H0 588441) both of No 1897, Mile 1, Jalan Belunu, Tawau, Sabah (hereinafter severally and jointly referred to as 'the said vendors') at (sic) the first part and Tay Choo Foo (BIC K681511) of Lot 200, 1st Floor, Bangunan Yeong Siong, off Jalan Padungan, Kuching, Sarawak (hereinafter called 'the purchaser') of the other part.
>
> Whereas the said vendors are the registered proprietresses of all that parcel of land containing an area of 802 acres, more or less, and situate at

A approximately 40th mile from Lahat (sic) Datu, Kinabatangan, comprised in Lahat (sic) Datu District (hereinafter refer to as 'the said land').

And whereas the said vendors are also the directors of a company know (sic) as Harus Abadi Sdn Bhd having its registered office at Block K, No 4, Taman Likas Jaya, Likas Bay, Kota Kinabalu, Sabah (hereinafter referred to as 'the said company').

B And whereas the said vendors are selling the said land to the purchaser and the purchaser is desirous of purchasing the same upon the terms and conditions as contained hereinbelow.

Now it is hereby agreed between the parties as follows:

(a) The vendors will sell the said land to the purchaser and the purchaser C will purchase the same at the total price of Malaysian Ringgit two hundred and fifty six thousand six hundred and forty (RM256,640) only (hereinafter referred to as 'the said purchase price').

(b) The said purchase price shall be paid by the purchaser to the vendors by instalments in the manner as follows:

D (i) a sum of Malaysian Ringgit seventy six thousand nine hundred and ninety two (RM76,992) only shall be paid by the purchaser to the vendors upon the signing of this agreement; and

(ii) the balance sum of Malaysian Ringgit one hundred and seventy nine thousand six hundred and forty eight (RM179,648) only shall be paid by the purchaser to the vendors upon the issue of the land title to the said land by the relevant authority(ies) to the said E company.

(c) The said purchase price is exclusive of the premium in respect of the said land payable to the Land and Survey Department of Sabah in the sum of Malaysian one hundred only (RM100) per acres (sic).

(d) The vendors shall not be responsible for any property gains tax payable F to the relevant authority at any time hereinafter.

(e) The vendors have not been issued with the land title to the said land but they undertake that the land title to the said land will be issued by the relevant authority(ies) in due course.

(f) Upon the issue of the land title to the said land by the relevant G authority(ies) the vendors shall ensure the purchaser (sic) that the same shall be transferred free from all encumbrances.

(g) In the event that the land title to the said land is not issued by the relevant authority(ies) within three (3) years from the date hereof then in such event the vendors shall refund to the purchaser whatever sums of money paid by the purchaser to the vendors without interest.

H (h) It is further agreed that the vendors shall resign as directors and appoint the purchaser as director of the said company and at the time of such appointment the vendors undertakes (sic) personally that the said company shall be free from all liabilities, debts and any other encumbrances.

I (i) Time wherever mention shall be at the ensure (sic) of this agreement.

(j) All costs in respect at (sic) this agreement and the registration thereof shall be borne by the parties hereto in accordance with the Advocate Remuneration Governing (sic) the State at (sic) Sarawak.

In witness whereof the parties hereto set their seal the day and year first above written.

Signed by the said:

(1) Wong Nget Thau (f)) — Sgd —

(2) Wong Nget Tsin @ Zaiton) — Sgd —

(Vendors) in the presence of:)

Witness:

Signed by the said)
Tay Choo Foo (Purchaser)) — Sgd —
in the presence of:)

Witness:

Instrument prepared by Messrs JB Singh & Co, Advocates of No 1 (1st Floor) Gambier Road, Kuching, Sarawak.

As for this agreement, the said advocate affirmed an affidavit on behalf of the defendant on 2 August 1994. He averred that he had sometime in 1990 prepared the agreement based on 'such little informations (sic) and instructions' as the defendant had supplied him. The agreement was, according to the said advocate, taken by the defendant to be sent to the plaintiffs in Tawau. It was after some time, added the said advocate, that the said agreement was returned by the defendant to him and it was then signed by the plaintiffs. It was during this time, he continued, that he was shown the written offer of alienation of land of the Director of Lands and Surveys, Sabah, containing terms which, he was of the opinion and he so advised the defendant, rendered the said agreement 'not a valid and proper agreement' because the plaintiffs were not the registered owners and there was a prohibition against transfer until the land was fully developed. It was after this advice, he continued, that the defendant specifically informed him that he would negotiate further with the plaintiffs the price for the said land. The other relevant parts of the affidavit of the said advocate are these:

(6) Based on my above advice ... the defendant informed me that he would inform the plaintiffs that the said agreement shall have no effect whatsoever and that since there was such a condition on the said land that he would have to negotiate further with the said Wong Nget Thau and Wong Nget Tsin @ Zaiton as to the sale of the said land.

(7) It was quite some time after my said advice to the defendant that the defendant's wife ... informed me that the defendant's office had received Forms 49 and 32A from the plaintiffs. The defendant's said wife then enquired from me as to the manner she should make full payment to the plaintiffs. I then advised the defendant's said wife that the said payment could either be sent to the plaintiffs through a legal firm or since the plaintiffs were dealing directly with the defendant then the said payment could be sent by any banker's order.

(8) At all material times the plaintiffs were dealing directly with the defendant and neither the copy of the said agreement nor any Form 49 and Form 32A were ever despatched or sent to me or my said firm.

A The defendant in his affidavit, affirmed on the same day as that of the said advocate, after stating his concurrence with the matters deposed to by the said advocate, avers:

> (4) [The company's] land application was at all material times initiated, effected and handled by one James Mohd Adnan Robert of Vickrasama
B Sdn Bhd at my instigation. Copies of the correspondence between Vickrasama Sdn Bhd and the relevant authorities are now produced and shown to us marked 'TCF1(a) to (d)'.
>
> (5) At all material times (from 1985–1988) I negotiated with one Chin Lee Hyen (deceased) for the sale and purchase of the total shares in Harus Abadi.
>
C (6) The said Chin Lee Hyen passed away sometime in late 1988.
>
> (7) Prior to the said Chin Lee Hyen's demise, it was orally agreed between us that the purchase price for the total shares in Harus Abadi was RM76,992.
>
> (8) After the said Chin Lee Hyen's demise, his wife, Wong Nyet Kiang @
D Stella Wong Nget Kiong orally attempted to vary the purchase price which I agreed with her late husband but to no avail.
>
> (9) Sometime before 7 June 1990, the said Wong Nyet Kiang @ Stella Wong Nget Kiong finally accepted the agreed consideration of RM76,992 and orally instructed me to remit the moneys to her.
>
> (10) I remitted the said sum of RM76,992 to the said Wong Nyet Kiang @
E Stella Wong Nget Kiong or Stella Chin as she was then addressed, on 7 June 1990 through Hock Hua Bank Bhd, Padungan Branch, Kuching. I was given a receipt dated 13 July 1990 by the first plaintiff sometime after. Copies of the said Hock Hua Bank Bhd remittance slip and the said receipt are now produced and shown to us marked 'TCF2(a)–(b)'.
>
F (11) After the events in para 10 above, I was instructed orally by the said Wong Nget Kiong @ Stella Wong Nyet Kiang that I may effect transfer of the two shares in Harus Abadi and which I did.

Those were the allegations concerning the purchase price, the agreement and the payment of the sum of RM76,992 which I will return to later on,
G but, first, to the undisputed documents which I mentioned earlier. Not only were they not disputed, both the said advocate and the defendant did not explain at all why, in so far as those letters emanating from them are concerned, they wrote them. The first of these documents, which I will refer to in chronological order, is an application by the said advocate dated
H 7 June 1990 for the remittance of the gross sum of RM76,992 to the sister (exh TCF2(b)). The said advocate never stated (see para 7 of his affidavit, supra) whether he had in fact remitted the said sum to the sister though he wished, by the equivocal way in which he deposed his affidavit, to convey the impression that the money was not remitted by him but by the defendant. When the said advocate's affidavit is read with that of the
I defendant, it is clear that the defendant is maintaining that it was him (the defendant) and not the said advocate who remitted the said sum to the sister (see para 10 of the defendant's affidavit, supra). This is an obvious untruth because the document clearly shows it was the said advocate who had remitted the money through a bank. As for the remittance of this sum

of RM76,992 (less bank charges), it must be borne in mind that the remittance of the money to the sister on 7 June 1990 was allegedly (see para 9 of the affidavit of the defendant, supra) in final settlement of the newly negotiated purchase price for the said land. This leads me to ask, if it is true that the sum of RM76,992 (less bank charges) was in full payment of the purchase price, why then did the said advocate issue, some eight days later, the said letter dated 15 June 1980 giving his undertaking not to register the share transfers and the resignation of the plaintiffs as directors of the company until the full sum had been paid when by that time the full purchase price had allegedly already been paid by the said advocate. This letter reads viz:

JB Singh & Co Advocates
Etc ...

15 June 1990

Mdm Wong Nget Thau
No 1897, Mile 1
Jalan Belunu
Tawau
Sabah

Without Prejudice

Dear Madam

Re: Harus Abadi Sdn Bhd

We refer to the telephone conversations between your goodself and our Mr JB Singh.

We undertake that the Forms 49 and 32A in respect of the above-captioned company shall be kept by us and shall be only registered after our client has paid the full sum to you as agreed.

Yours faithfully
—Sgd—
JB Singh & Co
Advocates

cc (1) Client

I pause here to remark that though it is common ground that the Forms 49 and 32A of the company, referred to in the just quoted letter, were sent directly by the plaintiffs to the defendant, it is not explained why the said advocate issued the just quoted letter and gave the undertaking not to register the Forms 49 and 32A until the defendant had 'paid the full sum to you as agreed'. Instead, objection was taken to the admission of his letter by Mr Sonny Durai, counsel for the defendant, which issue I will deal with later. The reason the defendant did not explain is obviously because the allegation that the agreed full purchase price was RM76,992 and which the said advocate had remitted cannot be true in the face of contemporaneous documents and facts which I have already adverted to. If any doubt lingers as to the inherent improbability of the allegation of the defendant, then surely this is laid rest when the following letters are considered. The first two of these letters, coming some ten months after the purchase price was allegedly paid in full, are from the defendant to the

A sister dated, respectively, 2 April 1991 and 10 April 1991. The letters are in the following terms:

> 2 April 1991
>
> Since you left I have checked with Patrick Loo for appointment of consultant for soil analysis but Patrick Loo took too long. Hence, I have appointed a
B consultant to do the soil survey at RM4.50 per acre only and the report has been completed and I shall bring it over on 4 April 1991 for approval by the Dept of Agriculture, KK.
>
> A further problem is that the sale of the company, consisting of the piece of land, will be subjected to property gains tax and income tax. To avoid the taxes, my accountant has advised me to increase the share capital
C to an extent that the tax will be to a very minimum (sic). The whole thing is only to increase the paid-up capital in order to offset the taxes.
>
> I hope you can advise your sister to give full co-operation and refer to your accountant, if necessary. Without your co-operation, there will be further delay in the collection of payment. As I mentioned to you earlier, nobody will pay cash immediately after transfer. We must allow a grace
D period as it is a universal practice.
>
> Please write to me giving your proposal so that we can expedite this matter once approval is given by the Dept of Agriculture.
>
> Your co-operation is most appreciated.

E 10 April 1991

> I have submitted the development plan to the Agricultural Department, KK personally and I expect approval in the near future. The only thing is the property gains tax. I therefore requested the tax consultant to advise us with a copy extended to you which is self-explanatory.
>
F Hope you can give your full co-operation such that we have no problem of tax in future (sic). Tax problem has been the main issue and I hope you appreciate it fully. It is inetical (sic) for us to ask for cash payment without following normal sale and purchase procedures.

The message conveyed by these two letters was that unless the plaintiffs
G increased the share capital of the company for tax purposes, payment to the plaintiffs would be further delayed. These two letters still talked, inter alia, about cash payment of the purchase price to the plaintiffs some ten months after the defendant had allegedly already paid the purchase price in full. I will move to the next letter which is dated 18 April 1991 from one of the plaintiffs to the said advocate and it says:

H

> I refer to the agreement made between Wong Nget Thau, Wong Nget Tsin @ Zaiton of No 1897, Mile 1, Jalan Belunu, Tawau, Sabah and Mr Tay Choo Foo of Lot 200, 1st Floor, Bangunan Yeong Siong, off Jalan Padungan, Kuching, Sarawak (Tel No 082–481117) and would be much appreciate (sic) if you could send me a copy of the agreement for my reference.

I It would seem that the plaintiffs were not supplied the agreement requested in the just quoted letter because the sister, when replying the said two letters of the defendant (supra), had by her letter dated 22 April 1991 requested for a copy of the agreement. The terms of this letter of 22 April 1991 from the sister to the defendant and his wife are:

Thank you for your two letters.

The contents of the letters are noted.

Meanwhile we cannot do anything until we have the development plan approved. I was told by the Deputy Director of the Agricultural Department that Mr Masudai had gone to England for a month. Mr Masudai did tell me that we must provide the soil analysis otherwise he will find it difficult to give approval. In fact he had given me his friend's name to contact.

While I was in KK during my last visit, Mrs Tay had informed me to increase the share capital and I had done so.

I will go back to KK once the development plan has been approved and hope to settle everything with you as I am very much worried about Harus Abadi Sdn Bhd.

Mr Tay, I beg you to send the agreement which my sisters had signed between them and you. You always promised to send but never do so (sic). Please either send it to my sister's address, PO Box 331, Tawau, Sabah or to me, and also not forgetting the letter of undertaking. I hope you can send both copies to us at your earliest convenience.

Thanking you.

This letter demonstrates the anxiety of the sister in getting the title to the land issued. Why should she bothered if there was no more money to be paid for the land and why did the plaintiffs increase the share capital of the company if it was not to expedite the payment of the balance of the purchase price which measure was suggested by the defendant in his said letters (supra). Again, the defendant did not bother to explain. If one is, thus far, still unconvinced that the balance of the purchase price was still to be paid by the defendant to the plaintiffs, surely the next and final letter that I will refer to makes it clear beyond any doubt. This letter from the defendant to the sister is dated 7 May 1991 and it says:

Dear Mrs Stella Chin

Thank you for your letter, it is time for you to get things right.

(1) I am acting on behalf of my friend whom you do not trust. Therefore, I have to sign an agreement with you instead of him.

(2) You and I are ignored (sic) of the income tax laws implemented by the Sabah Government since last year. They do not consider the low price stipulated in the agreement, but instead carry out their own assessment. Therefore, if I send the agreement stated RM2 paid-up to you, and your sister is so ignorant as to register the agreement, then you will have to pay very high tax.

(3) To cut the story short, if you are prepared to pay the property gains tax by confirming it in writing, I shall get a copy from the lawyer and send it to you but don't come back to me if you encounter any problems.

(4) I am doing everything I can for you to get the land registered. Enclosed herewith is the reply from the Dept of Agriculture, Sabah. A copy of the report will be extended to you when you are back to KK as it is quick (sic) a thick report.

(5) Please do not expect immediate payment after the land is registered and handed over to the purchaser. We must allow a grace period staggered payment (sic). If you are not sure of the sale and purchase procedure, please consult a lawyer or anyone with authority on the

A subject. It is not fair to demand immediate cash payment in full. Please refer to your legal adviser. If you want to deal with me, please have come (sic) trust otherwise it is difficult to work together. You must remember that 50% of this land should belong to the former TYT's son. Yet we transfer to you (sic) without any favour although your husband promised to pay some to James Robert. Seeing as he is no B longer able to testify, you are hereby entitled to have the full amount. Please don't treat us as men in the street.

(6) For tax purposes, the RM2 paid-up company (sic) has to be increased the paid-up capitals as high as the land cost (sic). To simplify the matter, we have already asked our accountants in Kuching to proceed with Golden Spring Development Sdn Bhd first. I suggest Harus Abadi C can ask him to handle for you and also it is easier for us to discuss with him in Kuching when whenever (sic) we have tax problems. If you agree, then your KK accountant has to resign and reappoint the Kuching accountant as your auditor. In fact, I did mention this matter to Robert Chin when I was in KK. He also quite agreed with me. Anyway, all the documents are with us now, we are waiting for your decision. Both D your sisters have to sign all these documents such as Forms 24, 32A, etc. As advised by our accountant, all these documents have to be submitted before 30 May 1991 as your 1990 account are closing on 30 June 1991 (One month before the account submitted).

Your early reply will most (sic) appreciated.

E [Signed by the defendant.]

This letter speaks of an agreement which the defendant had already signed and indicated that the agreement was with the lawyer. The defendant warned of the high tax payable if the agreement was to be used. This letter, I think, provides the clue why the said advocate refused to give the plaintiffs a copy of the agreement though requested by one of the plaintiffs F as said earlier. It is even possible to infer from the tone of this letter that the defendant had signed the agreement. What is also significant is that this letter still talk about payment to be made to the plaintiffs some 11 months after the defendant was supposed to have already paid the purchase price in full. If that is still not enough to demonstrate the implausibility of G the defence, the contradiction between what the said advocate and what the defendant deposed in their respective affidavits serves to dissuade any inclination towards allowing a trial. The said advocate had averred (see para 6 of his affidavit) that it was in consequence of his advice (proffered to the defendant either in 1990 or thereafter) that the agreement was invalid that the defendant told him he wanted to 'renegotiate' the price H (and thus confirm the existence of an agreement to pay the purchase price of RM256,640) whereas the defendant by paras 5, 6 and 7 of his affidavit, supra, contended that the purchase price of RM76,992 had, during the lifetime of one Chin Lee Hyen already been agreed on which was two years before he said he wanted to renegotiate the price, and therefore, the price I of RM76,992 was not a result of the renegotiation consequent upon the said advice of the said advocate. The defendant had averred that he had read the affidavit of the said advocate and 'concur with the matters deposed'. The defendant therefore in one breath says that the purchase price was arrived at after he had renegotiated the same with the sister in 1990. How could it be true, assuming for the moment that the said Chin

Lee Hyen was authorized to act for the plaintiffs, that the purchase price in 1988 or before that time was already agreed on at RM76,992 when, two years later, in 1990, the defendant gave instructions to the said advocate to prepare the agreement giving the purchase price of RM256,640.

Mr Sonny Durai had argued that the plaintiffs' claim is based on an implied agreement. I cannot see how that can be true given the masses of documents produced and to which I have referred. Those documents contain the terms of the agreement. Nothing was implied. It was also urged upon me that the defendant should be allowed a trial in order to prove the oral agreement he had reached with the said Chin Lee Hyen. I do not see any point in having such oral agreement since every document emanating thereafter and from the defendant or his advocate militates against there being such an agreement for the purchase price of RM76,992. The documents clearly support the plaintiffs' claim that the purchase price was RM256,640. There remains one final issue which is the admissibility of the said letter of the said advocate which Mr Sonny Durai asserts is 'inadmissible as it is a privileged document and marked "without prejudice"' and he referred to *Styrobilt Sdn Bhd v Kumpulan Kim Huat (Sin Kee) Sdn Bhd* [1990] 2 CLJ 848 which had cited *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17, which latter case, at p 18, says:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

I am of the view that *Malayan Banking Bhd v Foo See Moi* does not lay down the proposition that any letter that is marked 'without prejudice' is inadmissible irrespective of the circumstances in which it was issued. The fact that a document is headed 'without prejudice' does not conclusively or automatically render it privileged from admission in evidence in any subsequent proceedings and if a claim for such privilege for the document is challenged the court will look at the document to determine its nature. The court must in each case, when deciding whether a particular letter marked 'without prejudice' is admissible, consider whether the letter was part of a genuine attempt to settle a dispute. See *South Shropshire District Council v Amos* [1987] 1 All ER 340; [1986] 1 WLR 1271. Was there then a dispute? It will be recalled that the terms of letter of the said advocate dated 15 June 1990, which was headed 'Without Prejudice' reads:

> We undertake that the Forms 49 and 32A in respect of the above-captioned company shall be kept by us and shall be only registered after our client has paid the full sum to you as agreed.

and it was written about one week after the said advocate had remitted a sum of RM76,992 (less bank charges) for payment to the plaintiffs. At the time of this letter of the said advocate, the title to the land concerned had not yet been issued and it was only issued on 22 March 1993. It will be recalled also that the balance of the purchase price was only due when the

A title was issued to the company. There was therefore no dispute at that time because the plaintiffs had not then demanded payment since payment was not then due. The plaintiffs were at that time asked to sign away ownership and directorship of the company, the eventual registered owner of the land when the title is issued, when they had not been paid in full. When the sequence of events which I have just related are taken into account, I do not think there can be any doubt that the said undertaking given in the letter of the said advocate was to put the plaintiffs at ease as regards their signing away their ownership and directorship of the company before they had been paid in full. The said advocate, unfortunately, instead of explaining his letter attempted to seek refuge under a misconceived 'without prejudice' label affixed to his letter that came unstuck. There was no dispute existing at the time of his said letter. Since there was no dispute, the letter of the said advocate was not written in an attempt to settle a dispute or in the course of negotiation. The letter of the said advocate is therefore admissible. I must add that even without the letter of the said advocate, the other documents which I have set out earlier are sufficient to establish a clear case for summary judgment for which the defendant had not been able to show the court why there should be a trial. I have gone through the affidavits and the documents of this case in detail, a course I am obliged to do as the authorities I shall refer next refer to appear to suggest. It is said in *Banque de Paris et Des Pays-Bas (Suisse) SA v Costa de Naray & Anor* [1984] 1 Lloyd's Rep 21 at p 23:

> It is of course trite law that O 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or bona fide defence.

I am of the view that in order to look at the whole situation, as the just quoted case says, I must surely go through the affidavits and documentary evidence and I cannot imagine any court doing that cursorily. Though it is trite law that a conflict of evidence ought not to be disposed of on affidavit evidence only, it is also trite law that the affidavit evidence must not be uncritically accepted and this is what the Privy Council in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 at p 217 said:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Therefore, the affidavit evidence would have to be examined in detail to see if 'there is a fair or reasonable probability of the defendants having a real or bona fide defence'. I am of the view that the whole of the evidence has to be looked at, even if it involves a minute examination of documents and facts, if by such exercise the court can come to the conclusion that there is no fair or reasonable probability of the defendants' having a real or

bona fide defence. The Privy Council in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, went through the evidence with a fine-tooth comb, (that was what the Supreme Court was of the opinion in *Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16). I do not see why the court cannot do that in an O 14 proceeding. The court also went through the evidence in *Banque de Paris et Des Pays-Bas (Suisse) SA v Costa de Naray & Anor* [1984] 1 Lloyd's Rep 21 in considerable detail. I have also gone through the evidence in detail in the unreported case of *Ribu Daya Sdn Bhd v Malsa Ideal Sdn Bhd & Ors* (Tawau High Court Civil Suit No T25–1991, 2 July 1994). Other courts appear to have already taken a similar view, like the High Court in Penang in the cases of *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495 and *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368. Could it then, after going through the affidavits and documentary evidence and considering the circumstances, be said that there is 'a fair or reasonable probability of the defendant having a real or bona fide defence'? What the court has to do in order to arrive at that decision is stated by the Supreme Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 at pp 321–322 thus:

> It need hardly be emphasized that in order for the court to arrive at a decision that the defence has merits, it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision.

I have weighed the evidence in this case. To recap, the defendant alleges that the plaintiffs had, through one Chin Lee Nyen sometime in 1988 or before that, agreed that the purchase price should be RM76,992 but he did not explain why in 1990 he instructed his said advocate to draw up an agreement which stated the purchase price to be RM256,640 and payable by a first instalment of RM76,992 and with the balance payable when the title was issued. He also did not explain why he gave the plaintiffs the agreement for their signatures. He also did not explain why the said advocate acknowledged in his letter that the full payment had yet to be made if, one week before that, the defendant had already made full payment of the renegotiated purchase price. It is just not plausible for the defendant to have issued all those letters which I have set out, acknowledging that payment was still due to the plaintiffs, if he in fact did not owe the plaintiffs any balance of the purchase price. I am in complete agreement with Mr David Fung, counsel for the plaintiffs, that there is no triable issue, nor is there any reason why there should be a trial. I therefore order judgment be entered for the plaintiffs against the defendant as prayed in the summons-in-chambers dated 15 July 1994.

Application allowed.

Reported by Anne Khoo